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Tetuan Lim & Keong v Too Jiao Yang

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCVC-8–01 OF 2023
MOHD ARIEF J
21 NOVEMBER 2023

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Civil Procedure — Pleadings — Amendment — Application to amend defence and add counterclaim — Application made one day before trial — Whether explanation proffered for delay in filing application — Whether sessions court correctly dismissed application

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Legal Profession — Solicitors — Stakeholding — Whether solicitors ('stakeholder') bound by terms of stakeholder agreement — Whether stakeholder breached terms of stakeholder agreement — Whether stakeholder entitlement to release stakeholder sum

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The defendant ('appellant') was acting as the solicitors for the vendor of a Sports Toto license. The appellant had stated that the vendor was willing to sell the shares in the company that held the said license. The respondent indicated their interest in purchasing the shares in the company with conditions. After several counter offers and counter proposals, several terms were agreed by the parties, namely: (a) the deposit shall be paid to the appellant as stakeholder pending the completion of a due diligence to be conducted for the acquisition; (b) the deposit shall only be released upon the completion of the acquisition process; and (c) the deposit shall be refunded to the respondent if the acquisition process was aborted. Pursuant to the said terms, the respondent issued a cheque for the sum of RM300,000 to be kept by the appellant as stakeholder pending the due diligence. The respondent then discovered that the actual Sports Toto license was not held by the vendor but was held by one Law Chin Boo @ Low Chin Boo and that it could not be transferred without the consent of the Ministry of Finance. As a result, the respondent terminated the acquisition and sought the return of the said deposit from the appellant. The vendor terminated the services of the appellant and appointed one Messrs Oh Teik Keng & Partners ('new firm'). The new firm informed the appellant that they were now taking over the conduct of the matter and directed the stakeholder sum previously received by the appellant to be returned to the respondent. The appellant however contended that: (i) the deposit was non-refundable; and (ii) the stakeholder sum would be held by him and released to four different individuals, as well as to the vendors. Therefore, the respondent commenced an action against the appellant at the sessions

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court, where the sessions court after trial had ordered that the appellant pay the sum of RM40,000 being damages or costs incurred for the aborted acquisition/due diligence costs and general damages of RM60,000 for the alleged misrepresentation ('sessions court's decision'). Aggrieved, the appellant filed two appeals against the decision of the sessions court. The first appeal was against the decision of the sessions court in dismissing the appellant's application to amend its defence and add a counterclaim. The second appeal was in relation to the judgement entered against the appellant. The issues that arose for determination were: (A) whether the appellant's defence failed to prove that the appellant was entitled to release the stakeholder sum; (B) whether the sessions court failed to be given the appellant the opportunity to call additional witnesses at trial; and (C) whether the sessions court judge ('SCJ') should not have ordered the appellant to pay the sum of RM40,000 being damages or costs incurred for the aborted acquisition/due diligence costs and general damages of RM60,000 for the alleged misrepresentation.

Held, allowing the appeals in part:

(1) The application to amend the defence and add a counterclaim was filed on the eve of the trial. There was no explanation afforded or attempted by the appellant to explain why the said application was filed late. Also, the appellant did not disclose full particulars justifying the amendment and did not produce sufficient evidence to show the chances of success of the proposed amendments. Hence, the appellant's application should not be entertained. The SCJ did not committed any error justifying appellate interference and hence, the first appeal was dismissed with costs (see paras 8–12).

(2) The appellant could not deny that he was obliged to keep the sums deposited with him on the undertaking that the funds would not be released until the due diligence process was finalized. The due diligence failed, and the sale had to be stopped as the respondent found that the Sports Toto license was incapable of being transferred until such time when the Ministry of Finance gave its consent and that the license did not belong to the company, the subject matter of acquisition. The sums deposited with the appellant should not have been released and there was no evidence that the respondent agreed to waive this condition. In the circumstances, there was no errors justifying appellate intervention on the issue of the order directing the appellant to repay the respondent the stakeholder sum deposited with the firm. The firm should have followed the terms of the stakeholder and withstood any attempt by any party to have the sums released to them (see paras 31–32).

(3) The appellant did not comply with any of the directions given by the SCJ during case management. The appellant did not file any list of witnesses, no bundle of documents and did not prepare and file witness statements

before trial. Notwithstanding this, the appellant was allowed the opportunity to give evidence. Further, during trial, the appellant only stated the firm wanted to call four other witnesses without identifying who they were and whether these individuals were willing and able to attend trial. In the circumstances, the court found that the alleged four witnesses were merely a ploy to delay proceedings. Therefore, the SCJ had not failed to exercise his discretion correctly and had given ample opportunity to the appellant to present its case. There were no errors as alleged by the appellant that justify appellate intervention (see paras 36–38 & 40).

(4) The respondent had not proven their claim for misrepresentation. The SCJ had erroneously found that the appellant was not acting for the vendor. The new firm had only confirmed that they were now taking over the conduct of the matter and directed the stakeholder sum previously received by the appellant, to be returned to the respondent. This did not mean that the appellant was not acting for the vendors or the company. That could not justify the claim of misrepresentation or fraud as alleged by the respondent (see para 43).

(5) The decision of the sessions court that the appellant had misrepresented his authority could not be sustained. The evidence produced shows that he had in fact acted for the said Low Chin Boo @ Low Chin Boo but was subsequently replaced by the client. Otherwise, the new firm would not have used the words 'erstwhile solicitors'. If there was any misrepresentation that could be acted upon was that of a potential claim against Low Chin Boo @ Low Chin Boo or the company holding the said license. The claim was not against the appellant who was only acting as solicitors for the said Low Chin Boo. The firm had wrongly released the sum of RM300,000 that should have been held as a stakeholder, but the said firm was not guilty of misrepresentation either negligently or fraudulently. Therefore, the finding of the SCJ was wrong and appellate interference was required (see paras 54, 56–57 & 60).

(6) The appeal concerning the claim for damages of RM40,000 and exemplary damages to the sum of RM60,000 was partly allowed. The appellant was not guilty of fraudulent misrepresentation as found by the SCJ and should not be held liable for the costs of due diligence incurred by the respondent. However, the appellant was liable to pay the sum of RM300,000 to the respondent and also directed the appellant pay to the respondent the sum of RM10,000 as exemplary damages for the said wrong (see paras 61–62).

[Bahasa Malaysia summary

Defendan ('perayu') bertindak sebagai peguam cara untuk penjual lesen Sports Toto. Perayu telah menyatakan bahawa penjual menjual saham dalam syarikat

yang memegang lesen tersebut. Responden menyatakan minat mereka untuk membeli saham dalam syarikat dengan syarat. Selepas beberapa tawaran balas, beberapa syarat telah dipersetujui oleh pihak-pihak, iaitu: (a) deposit hendaklah dibayar kepada perayu sebagai pemegang saham sementara menunggu selesainya usaha wajar yang akan dijalankan untuk pemerolehan saham; (b) deposit hanya akan dikeluarkan setelah selesai proses pemerolehan; dan (c) deposit hendaklah dikembalikan kepada responden sekiranya proses pemerolehan dibatalkan. Selaras dengan syarat-syarat tersebut, responden mengeluarkan cek sebanyak RM300,000 untuk disimpan oleh perayu sebagai pemegang saham sementara menunggu usaha wajar. Responden kemudian mendapati bahawa lesen Toto Sukan sebenar tidak dipegang oleh penjual tetapi dipegang oleh Law Chin Boo @ Low Chin Boo dan ianya tidak boleh dipindahkan tanpa persetujuan Kementerian Kewangan. Akibatnya, responden menamatkan pengambilalihan dan meminta pemulangan deposit tersebut daripada perayu. Penjual menamatkan perkhidmatan perayu dan melantik Tetuan Oh Teik Keng & Partners ('firma baru'). Firma baru itu memaklumkan perayu bahawa mereka kini mengambil alih perkara itu dan mengarahkan wang jumlah pemegang saham yang sebelum ini diterima oleh perayu untuk dikembalikan kepada responden. Perayu walau bagaimanapun berpendapat bahawa: (i) deposit itu tidak boleh dikembalikan; dan (ii) jumlah pemegang saham akan dipegang olehnya dan dilepaskan kepada empat individu yang berbeza serta kepada penjual. Oleh itu, responden memulakan tindakan terhadap perayu di mahkamah sesyen, di mana mahkamah sesyen selepas perbicaraan telah memerintahkan agar perayu membayar sejumlah RM40,000 sebagai ganti rugi atau kos yang ditanggung untuk pemerolehan/usaha wajar yang dibatalkan dan ganti rugi am sebanyak RM60,000 untuk tuntutan salah nyata ('keputusan mahkamah sesyen tersebut'). Terkilan atas keputusan tersebut, perayu memfailkan dua rayuan terhadap keputusan mahkamah sesyen tersebut. Rayuan pertama adalah terhadap keputusan mahkamah sesyen yang menolak permohonan perayu untuk meminda pembelaannya dan membuat tuntutan balas. Rayuan kedua adalah berhubung dengan penghakiman yang dimasukkan terhadap perayu. Isu-isu yang timbul untuk penentuan ialah: (A) sama ada pembelaan perayu gagal membuktikan bahawa perayu berhak untuk melepaskan jumlah pihak pemegang saham; (B) sama ada mahkamah sesyen gagal memberi peluang kepada perayu untuk memanggil saksi tambahan di dalam perbicaraan; dan (C) sama ada hakim mahkamah sesyen ('HMS') terkhilaf ketika memerintahkan perayu membayar sejumlah RM40,000 sebagai ganti rugi atau kos yang ditanggung untuk kos pemerolehan/usaha wajar yang dibatalkan dan ganti rugi am sebanyak RM60,000 untuk dakwaan salah nyata.

Diputuskan, membenarkan rayuan-rayuan secara sebahagian:

(1) Permohonan untuk meminda pembelaan dan menambah tuntutan balas telah difailkan hampir dengan masa perbicaraan. Tiada penjelasan yang

diberikan oleh perayu untuk menjelaskan alasan permohonan tersebut difailkan lewat. Selain itu, perayu tidak mendedahkan butiran penuh yang mewajarkan pindaan itu dan tidak mengemukakan bukti yang mencukupi untuk menunjukkan prospek kejayaan pindaan yang dicadangkan. Oleh itu, permohonan perayu tidak boleh dilayan. HMS tidak melakukan sebarang kesilapan yang mewajarkan campur tangan rayuan. Oleh itu, rayuan pertama ditolak dengan kos (lihat perenggan 8–12).

(2) Perayu tidak menafikan bahawa dia diwajibkan untuk menyimpan jumlah yang dimasukkan kepadanya dengan aku janji bahawa jumlah itu tidak akan dikeluarkan sehingga proses usaha wajar selesai. Usaha wajar telah gagal dan penjualan terpaksa dihentikan kerana responden mendapati bahawa lesen Toto Sukan tidak dapat dipindahkan sehingga Kementerian Kewangan memberikan persetujuannya dan bahawa lesen itu bukan milik syarikat yang merupakan perkara tuntutan pemerolehan saham. Jumlah yang dimasukkan kepada perayu tidak sepatutnya dilepaskan dan tidak ada bukti bahawa responden bersetuju untuk mengenepikan syarat ini. Dalam keadaan itu, tidak ada kesilapan yang mewajarkan campur tangan rayuan mengenai isu perintah yang mengarahkan perayu untuk membayar balik responden jumlah pemegang saham yang dimasukkan ke akaun firma itu. Firma itu sepatutnya mengikut syarat-syarat pemegang saham dan menahan sebarang percubaan oleh mana-mana pihak untuk mengeluarkan jumlah kepada mereka (lihat perenggan 31–32).

(3) Perayu tidak mematuhi mana-mana arahan yang diberikan oleh HMS semasa pengurusan kes. Perayu tidak memfailkan sebarang senarai saksi, tiada ikatan dokumen dan tidak menyediakan dan memfailkan pernyataan saksi sebelum perbicaraan. Walau bagaimanapun, perayu diberi peluang untuk memberi keterangan. Selanjutnya, semasa perbicaraan, perayu hanya menyatakan firma itu mahu memanggil empat saksi lain tanpa mengenal pasti siapa mereka dan sama ada individu ini bersedia dan mampu menghadiri perbicaraan. Dalam keadaan itu, mahkamah mendapati bahawa empat saksi tersebut hanyalah muslihat untuk menangguhkan prosiding. Oleh itu, HMS tidak terkhilaf ketika menggunakan budi bicaranya dengan betul dan telah memberi peluang yang mencukupi kepada perayu untuk mengemukakan kesnya. Tiada kesilapan seperti yang didakwa oleh perayu yang mewajarkan campur tangan rayuan ini (lihat perenggan 36–38 & 40).

(4) Responden tidak membuktikan dakwaan mereka untuk salah nyata. HMS telah terkhilaf ketika mendapati bahawa perayu tidak bertindak bagi pihak penjual. Firma baru itu hanya mengesahkan bahawa mereka kini mengambil alih perkara itu dan mengarahkan jumlah pemegang

saham yang sebelum ini diterima oleh perayu, untuk dikembalikan kepada responden. Ini tidak bermakna bahawa perayu tidak bertindak untuk penjual atau syarikat. Hal ini tidak dapat mewajarkan dakwaan salah nyata atau penipuan seperti yang didakwa oleh responden (lihat perenggan 43).

(5) Keputusan mahkamah sesyen bahawa perayu telah membuat salah nyata tidak dapat dikekalkan. Keterangan yang dikemukakan menunjukkan bahawa dia sebenarnya telah bertindak untuk Low Chin Boo @ Low Chin Boo tersebut tetapi kemudiannya digantikan oleh anak guam. Jika tidak, firma baru itu tidak akan menggunakan perkataan 'bekas peguamcara'. Sekiranya terdapat sebarang salah nyata yang boleh diambil tindakan ialah tuntutan yang berpotensi terhadap Low Chin Boo @ Low Chin Boo atau syarikat yang memegang lesen tersebut. Tuntutan itu bukan terhadap perayu yang hanya bertindak sebagai peguam cara untuk Low Chin Boo tersebut. Firma itu telah salah melepaskan jumlah RM300,000 yang sepatutnya dipegang sebagai pemegang saham, tetapi firma tersebut tidak bersalah atas salah nyata sama ada cuai atau penipuan. Oleh itu, penemuan HMS adalah salah dan campur tangan rayuan ini adalah diperlukan (lihat perenggan 54, 56–57 & 60).

(6) Rayuan berkenaan tuntutan ganti rugi sebanyak RM40,000 dan ganti rugi teladan sebanyak RM60,000 telah dibenarkan sebahagiannya. Perayu tidak bersalah atas salah nyata penipuan seperti yang didapati oleh HMS dan tidak sepatutnya dipertanggungjawabkan ke atas kos usaha wajar yang ditanggung oleh responden. Walau bagaimanapun, perayu bertanggungjawab untuk membayar sejumlah RM300,000 kepada responden dan juga mengarahkan perayu membayar kepada responden sejumlah RM10,000 sebagai ganti rugi teladan bagi kesalahan tersebut (lihat perenggan 61–62).]

Cases referred to

Beyond Hallmark Sdn Bhd v Leong Tuck Onn & Anor [2018] MLJU 2051; [2018] MLRHU 1809, HC (refd)

Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401, CA (refd)

Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)

Mahabuilders Berhad v Hotel Rasa Sayang Sdn Bhd [2014] 3 CLJ 661, HC (refd)

Nasir Kenzin & Tan v Elegant Group Sdn Bhd [2008] MLJU 664; [2009] 1 CLJ 47, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
OCBC (Malaysia) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134; [1999] 1 MLRA 668, CA (refd)
Petronas Hartabina Sdn Bhd v Mohmood Adam & Anor [2003] 7 MLRH 289, HC (refd)
Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor [2021] 5 MLJ 836; [2021] 7 CLJ 353, CA (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267b; [1979]1 LNS 107, PC (refd)
Tekdata Interconnections Ltd v Amphenol Ltd [2010] 2 All ER (Comm) 302, CA (refd)
Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd [1987] 1 MLRA 166, CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] 1 CLJ 191, FC (refd)

Legislation referred to

Rules of Court 2012

Lim Boon Kong (Lim & Keong) for the appellant.
Fong Yin Kee (with Eunice Kwong) (Ricky Tan) for the respondent.

Mohd Arief J:

INTRODUCTION

[1] The appellant, Messrs Lim & Keong, have filed two appeals against the orders of the sessions court that: (i) dismissed the application to amend the defence and add a counterclaim; and (ii) entered judgment against the appellant, who was the defendant, in the proceedings before the sessions court.

DECISION OF THIS COURT

[2] After considering the records of appeal, submissions filed and the grounds of the learned sessions court judge, I find that the sessions court judge did not commit any errors with respect to the decision not to allow the amendments sought but was wrong in part of the orders entered against the appellant after trial.

[3] My reasoning for the above is stated in the following paragraphs.

DETAILED REASONS OF THIS COURT

Appeal WA-12ANCVC-299–10 of 2022: Application to amend at the eve of trial — Should not be allowed unless reasons given

[4] The appellant sought to amend the defence and add a counterclaim by filing an application on 16 June 2022. The trial of the suit was fixed on 17 June 2022.

[5] Therefore, the application to amend was filed a day before trial and did not provide any reasonable explanation why the said application was filed late.

[6] The following material facts concerning the course of proceedings before the sessions court was laid down by the learned trial judge:

(a) the suit was filed on 26 February 2022;

(b) defence was filed on 10 March 2022 and a reply was filed 22 March 2022;

(c) the sessions court had undertaken case management of the suit on 20 April 2022 and had fixed the trial to be heard on 17 June 2022. Directions were given for a common bundle of documents, exchange of witness statements as well as for the filing of the list of witnesses;

(d) the appellant/the defendant did not file their list of witnesses and did not file the witness statements; and

(e) the appellant also did not file the application to amend its defence earlier and only chose to file its amendment on the eve of the trial, a day before the date fixed for trial.

[7] I agree that it is trite law that generally ample latitude should be given to a litigant to amend its pleading if the other side is not prejudiced, and it does not change the characteristic of the defence or claim. See *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] 1 CLJ 191.

[8] However, as the application was filed on the eve of the trial, this application cannot be entertained. I refer to the decision of the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301, where Zulkelfi Makinudin CJ (Malaya) as he then was held:

> [25] The courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant to furnish a reasonable explanation for such a delay. They seem to have considered this as an additional factor to the *Yamaha Motor*'s rules. The need to show 'some material and advance some cogent reasons' was applied in *Taisho Company Sdn Bhd v Pan Global*

Equities Bhd & Anor [1999] 1 MLJ 359; [1999] 1 CLJ 703 Haidar JCA (as he then was) held:

> The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. *We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in Multi-Pak Singapore Pte Ltd and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side.* We would further add that the application borders on lack of bona fides, one of the basic question set out in *Yamaha Motor Co Ltd*. (Emphasis added.)

The requirement to advance some material and cogent reasons was likewise followed in the subsequent decisions in the cases of *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49; [2000] 4 CLJ 830 and *Everise Hectares Sdn Bhd v Citibank Bhd* [2010] MLJU 1379; [2011] 2 CLJ 25.

[26] It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see O 34 r 4(1) of the RHC 1980 (now O 34 r 1(1) of the RC 2012) and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.

...

[33] Having considered the facts and the circumstances of the present case, our views are as follows:

(a) when dealing with an application to amend the pleadings, which introduce a new case in the claim or defence, on the eve of the trial, the principles in *Yamaha Motor* are not the sole considerations;

(b) the principles in *Yamaha Motor* applies to cases where the application to amend the pleadings is made at an early stage of the proceedings;

(c) that there has to be a cogent and reasonable explanation in the applicant's affidavit as to why the application was filed late;

(d) that the application to amend the pleadings is not a tactical manoeuvre;

(e) that the proposed amendment must disclose full particulars for the court to ascertain if there is a real prospect of success in proving the same; and

(f) that lateness in the application to amend the pleadings cannot necessarily be compensated by payment of costs.

A Accordingly, our answers to question 1(a) is in the negative and as for question 1(b), the matters to be considered in considering an application to amend pleadings are as set out in sub-paras (2)–(6) above.

B **[9]** I have considered the affidavit filed by the appellant in support of the application to amend and I find that there was no explanation afforded or attempted by the appellant to explain why the said application was filed late. The said affidavit only contained seven paragraphs and did not explain why the said application was necessary and why the appellant/defendant waited at the last minute before the amendments were proposed.

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[10] I also find that the appellant/defendant did not disclose full particulars justifying the amendment and did not produce sufficient evidence in the Affidavit to show the chances of success of the proposed amendments.

D Conclusion for appeal against decision not to allow application to amend

[11] In the circumstances, I find that the learned sessions court judge did not commit any error justifying appellate interference. I find that the sessions court E had correctly applied the law and considered the arguments put forward by the litigants. The decision is correct in law and should not be interfered with.

[12] For the above reasons, I dismiss the appeal with costs of RM5,000 subject to allocator to be paid by the appellant to the respondent.

F *Appeal WA-12BNCVC-8–01 of 2023: After trial law on appellate interference — Decision after trial*

[13] It is trite law that when dealing with an appeal after trial, this court will G be slow to interfere with the findings made by the court below unless it is shown that the decision was plainly wrong that no reasonable competent judge could have arrived to the said decision based on the facts and evidence before the court.

H **[14]** I refer to the decision of the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 where Zabarian Mohd Yusof FCJ held:

I As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[15] I also reproduce the following paragraphs from the judgment of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665, where Nallini Pathmanathan JCA (as she then was) stated:

> [14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v Foxworth Investments Ltd* and another, Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':
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> ... there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.
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> [16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. appellant courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying appellate intervention.
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> [17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all contribute towards a decision that would be considered to be 'plainly wrong'.

A [18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings B of fact or the making of bare findings of fact, all allow for appellate intervention. Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally when there has been just such a C holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.

Background facts

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[16] The appellant was acting as the solicitors for the vendor of a Sports Toto license held at Jalan Pasar Baharu, Kuala Lumpur. The appellant had stated by letter dated 10 September 2021 that their clients were willing to sell the shares in the company that held the said license for the price of RM1.4m and that a E deposit of RM300,000 is paid to commence the acquisition process of the said shares.

[17] The respondent's solicitors responded with a letter dated 14 September 2021 indicating that the respondent was interested in purchasing the said F company with conditions. The appellant responded to the letter as seen in the correspondence dated 21 September 2021. This letter contained a counteroffer to the previous offer dated 14 September 2021.

G **[18]** The respondent did not agree to the counteroffer made by the appellant and issued a letter dated 23 September 2021 that contains a counter proposal which are as follows:

> 2. Kindly take note that we have been instructed by our client to counter propose and state that our client is agreeable to pay the deposit in the sum of RM300,000.00 H to you as stakeholder pending due dlilgence to be conducted and the completion of the acquisition process subject to the following terms that:
>
> (a) The monthly average sale of the company for year 2019 shall be in the sum of RM600,000.00 and your client shall provide us the supporting evidence on commissions received from Sports Toto to our client to prove I the same;
>
> (b) The licence from Sports Toto obtained by the said company shall remain valid during and after the acquisition process of the said company which is in progress;

(c) A guarantee from your client that the company have not breached the licensing agreement with Sports Toto and/or carried out any conduct that shall render the license from Sports Toto to be revoked;

(d) Your client shall ensure that the tenancy with the current Landlord of the premises shall be renewed and extended with the terms that are agreeable by our client;

(e) The deposit paid to you to hold as stakeholder shall be constituted as part payment of the Purchase Price and shall be released to your client only upon completion of the acquisition process; and

(f) The deposit shall be refunded in the event that the acquisition process of the said company is aborted.

[19] The counter proposal was accepted by the vendor as seen in the appellant's letter dated 24 September 2021 except as item 2(d). For our purposes, the terms of the acquisition of the said license could be summarised as follows:

(a) the deposit of RM300,000 shall be paid to the appellant as stakeholder pending the due diligence to be conducted for the acquisition of the license;

(b) the deposit paid to the appellant shall only be released upon completion of the acquisition process; and

(c) the deposit shall be refunded if the acquisition process is aborted.

[20] Pursuant to the said terms, the respondent issued a cheque for the sum of RM300,000 to be kept by the appellant as stakeholder pending the due diligence to be conducted for the purchase of the said shares. The sum was paid to the appellant as seen in the letter dated 1 October 2021 and the cheque dated 29 September 2021.

[21] The respondent found that the actual Sports Toto license was not held by the appellant's client, the company, but was held by one known as Law Chin Boo @ Low Chin Boo and that it cannot be transferred without the consent of the Ministry of Finance. As a result, the respondent chose to terminate the acquisition and sought the return of the said deposit from the appellant as seen in the letter dated 16 December 2021. I also refer to the letters issued by the respondent's solicitors dated 12 January 2022, 14 January 2022 and 21 January 2022.

[22] The vendor decided to terminate the services of the appellant and appointed one Messrs Oh Teik Keng & Partners. The said firm issued a letter dated 26 January 2022 to the appellant instructing them:

(a) that they now act for Mr Law Chin Boon and Mr Lim Ah Loon; and

(b) That the vendors have decided to terminate the sale and direct that the sum paid as deposit be refunded in full to the respondent.

[23] The appellant however contends that the said deposit is nonrefundable and that the above conditions were not agreed to by his client. He also contends that the parties agreed that the terms of the letter dated 24 September 2021 were binding on the parties. The appellant contends that the said stakeholder sum will be held by him and released to Miguel Wong Kim Yew, Cathay Wong Kok Thai, Bobby Lim Cheng Kee and Low Kuai Ching, as well as to the vendors. These individuals are allegedly entitled to commission for the sale of the said license and company.

DECISION OF THIS COURT

The appellant's defence failed to prove that he was entitled to release the stakeholder sum

[24] After considering the evidence before me as shown in the record of appeal, I find that the learned sessions court judge did not commit any errors of law or facts on the above issues.

[25] The letter dated 24 September 2021 relied on by the appellant was not accepted or agreed to by the respondent. As shown earlier, the respondent's solicitors issued a counter proposal dated 23 September 2021 that contained the following offers:

2. Kindly take note that we have been instructed by our client to counter proporse and state that our client is agreeable to pay the deposit in the sum of RM300,000.00 to you to hold as stakeholder pending the due diligence to be conducted and the completion of the acquisition process subject to the following terms that:

(a) The monthly average sale of the company for year 2019 shall be in the sum of RM600,000.00 and your client to prove the same;

(b) The license from Sports Toto obtained by the said company shall remain valid during and after the acquisition process of the said company which is in progress;

(c) A gurantee from your client that the company have not breached the licensing agreement with Sports Toto and/or carried out any conduct that shal render the license from Sports Toto to be revoked;

(d) Your client shall ensure that the tenancy with the current Landlord of the premises shall be renewed and extended with the terms that are agreeable by our client;

(e) The deposit paid to you to hold as stakeholder shall be constituted as part payment of the Purchase Price and shall be released to your client only upon completion of the acquisition process; and

(f) The deposit shall be refunded in the event that the acquisition process of the said company is aborted.

[26] This offer was accepted by the appellant by letter dated 24 September 2021. I accept that para 2(d) was not accepted but the other clauses were agreed to. The most important consideration is that the license must belong to the company, the subject matter of which would be the acquisition consideration for the payment of the purchase price. The other material consideration is that the stakeholder sums cannot be released until the acquisition process is complete. In other words, parties were ad idem on the issue of the stakeholder sum/deposit. This sum cannot and should only be released by the appellant to any party until the due diligence process is completed.

[27] It is trite law that in a battle of the forms, it is the duty of the court to assess the evidence objectively to consider whether parties are in ad idem as to the material terms of the contract or agreement. This is to be looked at objectively based on the conduct and documents exchanged between the parties. See *Mahabuilders Berhad v Hotel Rasa Sayang Sdn Bhd* [2014] 3 CLJ 661, *Tekdata Interconnections Ltd v Amphenol Ltd* [2010] 2 All ER (Comm) 302 and the locus classicus *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401.

[28] As such, the sessions court is correct to have found that the parties did agree to the terms as stated in the letter 23 September 2021. The appellant, being a firm of Solicitors, would also be subject to the terms of undertaking and cannot resile on what was agreed upon. I refer to the decision of the Privy Council in *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b; [1979]1 LNS 107 where Lord Diplock held:

> The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs Syarikat Alor Merah Sdn Bhd'. The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from 16 April 1974.

[29] I also refer to the decision of the Court of Appeal in *Nasir Kenzin & Tan v Elegant Group Sdn Bhd* [2008] MLJU 664; [2009] 1 CLJ 47, where Suriyadi Halim Omar JCA (as he then was) held:

A [18] With the letter of undertaking dated 4 December 2002 so clear, unequivocal and unambiguous, and the appellant having breached the solicitor's undertaking, we agreed with the learned judge that no triable issue had been raised by the appellant. The non-refund of the RM1m was a clear breach of the undertaking. That being so, with the facts and antecedents as they were, this panel had not
B hesitated to fully endorse the decision of the learned judge that this was a fit and proper case for summary judgement (*United Mining and Finance Corporation Ltd v Becher* [1910] 2 KB 296; [1907] 2 KB 539; *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267; [1979] 1 LNS 107).

C I also refer to the decision of the courts in *OCBC (Malaysia) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134; [1999] 1 MLRA 668, *Petronas Hartabina Sdn Bhd v Mohmood Adam & Anor* [2003] 7 MLRH 289, *Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd* [1987] 1 MLRA 166, *Beyond Hallmark Sdn Bhd v Leong Tuck Onn & Anor* [2018] MLJU
D 2051; [2018] MLRHU 1809 and *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533.

[30] It is worth repeating what the Federal Court stated in *Datuk M Kayveas v Bar Council*:

E [31] In our system of conveyancing, 'the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held' (*Toh Theam Hock v Kemajuan Perwira Management Corp Sdn Bhd* [1988]
F 1 MLJ 116; [1987] 2 CLJ 26; [1987] CLJ Rep 400 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). 'Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity' *(Halsbury's Laws of England* 4th Ed
G Reissue Vol 44(1) para 126) '... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe' (*Bentley and Another v Gaisford* [1997] 1 All ER 842, 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer Systems Ltd v Radcliffes & Co*, The
H Times 6 November 1991). 'If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at p 1287, [1967] Ch
I 1194 at p 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ...' *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of *Lords in Sorrell v Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor*, *Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor* and *OCBC Bank*

(Malaysia) Bhd & Ors v Lee Lee Fah & Ors & Another Appeal, amongst others. 'Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust' (*Selvaratnam Vellupillai v Dr Javabalan Karruoiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[32] And 'failure to honour an undertaking is prima facie evidence of professional misconduct ...' (Butterworth's Cordery on Solicitors para 903). The breach of an undertaking has also been variously held as grossly improper conduct (*Law Society of Singapore v Lim Kiap Khee*), as misconduct (*Cordery on Solicitors* 8th Ed at p 319), and as conduct unbefitting an advocate and solicitor (*Au Kong Weng v Bar Committee, Pahang* [1980] 1 LNS 4; [1980] 2 MLJ 89).

[31] Based on the above it is irrefutable that the appellant cannot deny that he is obliged to keep the sums deposited with him on the undertaking that the funds would not be released until the due diligence process is finalised. The due diligence failed, and the sale had to be stopped as the respondent found that the Sports Toto license was incapable of being transferred until such time when the Ministry of Finance gives its consent and that the license did not belong to the company, the subject matter of acquisition. The sums deposited with the appellant should not have been released and there is no evidence that the respondent agreed to waive this condition.

[32] In the circumstances, I do not find any errors justifying appellate intervention on the issue of the order directing the appellant to repay the respondent the stakeholder sum deposited with the firm. The firm should have followed the terms of the stakeholder and withstood any attempt by any party to have the sums released to them. Even if these sums were to be released, the appellant should have then obtained written confirmation from the solicitors for the respondent of the agreement to waive the stakeholder condition. Otherwise, the appellant would be incurring personal liability for breaching the terms of the stakeholder agreement.

ALLEGED BREACH OF NATURAL JUSTICE — DENIAL OF THE RIGHT TO CALL FOUR OTHER WITNESSES

[33] I do note that the appellant now claims that the sessions court had failed to be given them the opportunity to call additional witnesses at trial.

[34] The appellant claims that the firm was not given an opportunity to call their witnesses and present their case before the learned sessions court judge. Learned counsel complained that the respondent had failed to serve on them

the witness statements before the proceedings and was only given a copy of the respondent's witness statements on the day of the trial.

[35] I agree that generally ample latitude should be given to litigants to present their case before the courts. That is an accepted principle of justice that parties be given an opportunity to present their case. However, this is not an absolute right and parties are required to act in accordance with the directions of the courts and to comply with the Rules of Court applicable at the material time.

[36] In this case, the appellant did not comply with any of the directions given by the sessions court judge during case management. The appellant did not file any list of witnesses, no bundle of documents and did not prepare and file witness statements before trial as directed by the learned sessions court judge.

[37] I also note during the trial he did not tender any list of witnesses, did not produce their witness statements, and did not identify who the firm intends to call. The appellant only stated the firm wanted to call four other witnesses without identifying who they are and whether these individuals were willing and able to attend trial. The appellant during this appeal informs this court that these witnesses were co-operative, but this would mean that at the very least the witness statements of these individuals could have been filed on the day of the trial and produced to the sessions court judge for his consideration. This was never done by the appellant. There was complete disregard of all directions given by court without any reasonable explanation tendered to justify the indolent behavior by the appellant.

[38] I note the warning that must be heeded by all trial courts as seen in *Rekha d/o Munisamy v Ortus Expert White Sdn Bhd & Anor* [2021] 5 MLJ 836; [2021] 7 CLJ 353. However, in this case, I do not find that the learned sessions court judge had failed to exercise his discretion correctly. The learned sessions court judge had given ample opportunity to the appellant to present its case. The firm was given all reasonable opportunity to comply with the directions of the sessions court judge. Even when the firm failed to file the list of witnesses, the bundle of documents and the witness statements, the appellant was allowed the opportunity to give evidence. However, regarding the alleged four witnesses, I find that this was merely a ploy to delay proceedings. The appellant, even till today, failed to identify clearly who these four individuals were and what they will establish that could assist the appellant's case.

[39] I must also take this material fact into consideration. The appellant is not a layperson. The appellant is a firm of Advocate and Solicitor, and he even

admits and submits during trial, he is a seasoned litigator and is well versed with the legal process. I, therefore, do not find any reasonable reason justifying the delay by the appellant in complying with the sessions court's directions. The appellant would have surely realised the razor-sharp sword hanging over his head suspended by a single strand of hair if he chose not to comply with the directions of the court. He cannot now complain about the consequences of his own wrong.

[40] Even at the date of this appeal, no such witness statements were ready, and the said appellant did not even apply for leave to adduce additional evidence to support its appeal and provide sufficient evidence to support the existence of these alleged witnesses.

[41] For the above reasons, I do not find any errors as alleged by the appellant that justify appellate intervention on the above issues.

APPEAL ON DAMAGES CONCERNING DUE DILIGENCE AND FOR FRAUD/MISREPRESENTATION

[42] Notwithstanding the above, I agree with the appellant that the sessions court judge should not have ordered that he pay the sum of RM40,000 being damages or costs incurred for the aborted acquisition/due diligence costs and general damages of RM60,000 for the alleged misrepresentation.

[43] I do not find that the respondent has proven their claim for misrepresentation. The learned sessions court judge had erroneously found that the appellant was not acting for the vendor based on the letter dated 26 January 2022 from Messrs Oh Teik Keng & Partners. The said firm had only confirmed that they were now taking over the conduct of the matter and directed the stakeholder sum previously received by the appellant, to be returned to the respondent. This does not mean that he was not acting for the Vendors or the company. That could not justify the claim of misrepresentation or fraud as alleged by the respondent.

[44] I also find that the order for general damages is excessive. I believe that in this case, exemplary damages is justifiable as the appellant is a firm of solicitors and of sufficient seniority to be in the position to be aware of the seriousness of sums held by solicitors on behalf of clients as stakeholders. These directions must be complied with and failure to do so could attract legal and disciplinary consequences. However, the sums ordered is excessive and I therefore reduce it to the sum of RM10,000 being a fair amount that should be paid by the appellant as exemplary damages.

[45] It must be reminded that the appellant had only stated in its letter that

in his letter dated 10 September 2021, the firm had only stated that:

> Our client holds a license to operate a Sports Toto outlet at Jalan Pasar Baharu, Kuala Lumpur.
>
> Our client is offering to sell the entire company for the sale price of RM1,400,000.00 ...
>
> If you are interested, kindly pay a deposit of RM300,000.00 to us as solicitors for our client to commence the acquisition process.
>
> This deposit payment is non-refundable as long as our client is able to show that the average sales per month in 2019 is RM600,000.00

[46] This was followed with a subsequent letter dated 21 September 2021 where the firm stated:

> We are acting for the shareholders of Sungai Mesar Sdn Bhd ...

Parties have also shown that the gaming license was issued to Sungai Mesra Sdn Bhd and in the specific name of Law Chin Boo @ Low Chin Boo.

[47] The only representation that appears in the correspondence, even if this is to be entertained, is what appears in the letter dated 16 December 2021 issued by Messrs Ricky Tan & Co which states:

> We are instructed to state that at all material time, your client and/or your client's intermediary has represented to us to our client that the said license issued by the Ministry of Finance is attached to the company itself only and not to MR LAW as PP.

[48] Subsequently, Messrs Ricky Tan & Co, then alleged in its letter dated 14 January 2021 that:

> That on/or around 12.1.2022, our client was informed by the shareholder of Sungai Mesra Sdn Bhd, Mr Law Chin Boo that he has never given any instruction to you to act on behalf of the company and to collect the deposit in the sum of RM300,000.00 from our client for the aforesaid matter.

[49] I also note that Mr Law Chin Boo subsequently issued two letters through its new solicitors, Messrs Oh Teik Keng & Partners with the following date and contents:

(a) 26 January 2020:

> We are instructed to act for Mr Law Chin Boo @ Low Chin Boo and Mr Lim Ah Loon.
>
> ...

> We are further instructed that to return to you the deposit of RM50,000.00 and January 2022 rental of RM13,500.00 you paid to our clients todate, on the condition that you refund the entire deposit amounting to RM300,000.00 to the said Purchaser by 5.00 pm Friday 4th February 2022.

(b) 7 February 2022:

> Our clients have instructed us to return the deposit of RM50,000.00 together with the January 2022 rental of RM13,500.00 received from our client's erstwhile lawyers Messrs Lim & Keong.

[50] The important part of the letter dated 7 February 2022 is the confirmation that the appellant was the lawyer of Mr Law Chin Boo and the said firm was subsequently replaced by the new firm of Messrs Oh Teik Keng & Partners.

[51] Therefore, it cannot be said that the appellant was not representing the license holders, Mr Law Chin Boo or the company known as Sungai Mesra Sdn Bhd. He was only replaced by the firm of Messrs Oh Teik Keng & Partners. It is worth repeating what was said by the said firm:

> Our clients have instructed us to return the deposit of RM50,000.00 together with the January 2022 rental of RM13,500.00 received from our client's erstwhile lawyers Messrs Lim & Keong ...

The contents of this letter were simply ignored by the learned sessions court judge.

[52] This position is also contradicted by the fact that the said Law Chin Boo @ Low Chin Boo did receive the cheque of RM50,000 from the appellant's clients account and the rentals of RM13,500. This was subsequently returned to the appellant with the instruction that the stakeholder sum be returned to the respondent. This factor was also ignored by the learned sessions court judge.

[53] Another important factor I have considered is that the said Low Chin Boo @ Low Chin Boo was not produced by the respondent to explain the WhatsApp relied on by the respondent and to explain the contents of the letters issued by the lawyers referred to earlier.

[54] Therefore, the decision of the sessions court that the appellant had misrepresented his authority cannot be sustained. The evidence produced shows that he had in fact acted for the said Low Chin Boo @ Low Chin Boo but was subsequently replaced by the client as seen in the letter dated 7 February 2022. Otherwise, the new firm would not have used the words 'erstwhile

solicitors'. It is undisputed that Mr Low Chin Boo @ Low Chin Boo is the party holding the said license and the sum of RM50,000 was paid to him by the appellant.

[55] I also find that the only representation that was made during the negotiations is as what appears in Messrs Ricky Tan & Co's letter:

> We are instructed to state that at all material time, your client and/or your client's intermediary has represented to our client that the said license issued by the Ministry of Finance is attached to the company itself only and not to MR LAW as PR.

I stress the word intermediary was used by Messrs Ricky Tan & Co. This is not therefore a simple case as suggested by the respondent.

[56] If there is any misrepresentation that could be acted upon is that of a potential claim against Low Chin Boo @ Low Chin Boo or the company holding the said license. The claim is not against the appellant who was only acting as solicitors for the said Low Chin Boo. As I said earlier, the firm had wrongly released the sum of RM300,000 that should have been held as a stakeholder, but the said firm is not guilty of misrepresentation either negligently or fraudulently as alleged in this case.

[57] Therefore, the finding of the learned sessions court judge that appears in paras 62–72 of the grounds of judgment is wrong. The sessions court had failed to consider the above material consideration that would have shown that the firm is not guilty of misrepresentation as alleged. The appellant had acted for Mr Low Chin Boo. I find this finding is not sustainable. Surely the new firm would not have used the words 'erstwhile solicitors' of Mr Low Chin Boo in the letter dated 7 February 2022. As I have indicated earlier, the cheques issued by the said appellant to Mr Low Chin Boo were also not considered by the lower court.

[58] It is therefore wrong for the learned sessions court to merely rely on the WhatsApp conversations without the explanation of Mr Low Chin Boo. Mr Low Chin Boo was not produced to explain these contradictions to support the respondent's claim. It must be noted that the burden of proof lies at all material times with the respondent to prove its claim against the appellant and not the other way around.

[59] In view of these documents, it cannot be said that the appellant did not act for the license holder, Mr Low Chin Boo. The letters of Messrs Oh Teik Keng & Partners, that I referred to earlier, instead shows and confirms the appellant did act for Mr Low Chin Boo.

[60] I therefore find that this is a suitable case for appellate interference on this issue. In view of the documents before this court, I find that the sessions court judge should not have made the finding on liability on the issue of fraudulent misrepresentation and the claim for the loss arising from the due diligence expense claimed by the respondent.

CONCLUSION — APPEAL AGAINST DECISION AFTER TRIAL

[61] For the above reasons, I only allow the appeal partly concerning the claim for damages of RM40,000 and exemplary damages to the sum of RM60,000. I find that the appellant is not guilty of fraudulent misrepresentation as found by the learned sessions court judge and should not be held liable for the costs of due diligence incurred by the respondent.

[62] I however confirm that the appellant is liable to pay the sum of RM300,000 to the respondent and also direct the appellant pay to the respondent the sum of RM10,000 as exemplary damages for the said wrong.

[63] The orders concerning interest follow the orders of the sessions court and the costs of the lower court remain as ordered earlier. The costs of the appeal shall be equally borne by both litigants.

Appeals allowed in part.

Reported by K Selvaraju